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IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
William C. Whitbeck, Presiding Judge

MARY BAILEY
Plaintiff-Appellee,

v

OAKWOOD HOSPITAL AND MEDICAL CENTER
Defendant-Appellant,

Docket no. 125110

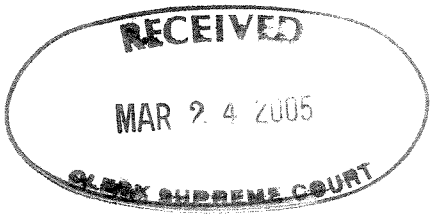
and

SECOND INJURY FUND
Defendant-Appellee,

and

DIRECTOR OF THE WORKERS' COMPENSATION AGENCY
Intervener-Appellee.
_____/

POST-SUBMISSION BRIEF ON APPEAL - AMICUS CURIAE MUNSON HOSPITAL



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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT[1]

The Court has jurisdiction to review the opinion that was entered by the Court of Appeals in *Bailey v Oakwood Hosp and Medical Center*, 259 Mich App 298; 674 NW2d 160 (2003) on November 6, 2003, by the authority of the Workers' Disability Compensation Act of 1969, MCL 418.101, et seq. MCL 418.861a(14), second sentence. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 706, 732; 614 NW2d 607 (2000).

[1] This is the same as the statement of the basis for the jurisdiction of the Court in the *Brief on Appeal - Amicus curiae Munson Hospital.*

STATEMENT OF QUESTION PRESENTED[2]

I

WHETHER ONLY SECTION 911, THIRD SENTENCE, LIMITS THE CIRCUMSTANCES FOR APPLYING SECTION 921, SECOND SENTENCE, OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

Plaintiff-appellee Bailey answers "No."

Defendant-appellant Oakwood answers "Yes."

Defendant-appellee Second Injury Fund answers "No."

Intervener-appellee Director of Agency answers "No."

Amicus curiae Munson answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "No."

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[2] This is the same question that was propounded in the *Brief on Appeal - Amicus curiae Munson Hospital.*

STATEMENT OF FACTS[3]

Plaintiff-appellee Mary Bailey (Employee) was certified as vocationally disabled by the Department of Education of the State of Michigan, hired by defendant-appellant Oakwood Hospital and Medical Center (Employer), and received a personal injury arising out of and in the course of employment. (35a) The Employee was then paid weekly workers' disability compensation and the costs of medical care by the Employer for more than the next fifty-two weeks. (35a) Later, the Employer suspended the weekly compensation believing that the Employee was avoiding remunerative employment. (35a)

The Employee then filed an application for mediation or hearing with the Bureau of Workers' Disability Compensation[4] to reinstate continuing weekly compensation from the Employer. The Employer appeared and denied responsibility in a carrier's response. (35a)

The Bureau remitted the case to the Board of Magistrates for hearing and disposition. While the claim was pending before the Board, the Employer filed a claim that it was not responsible for any compensation after the first anniversary of the injury and that the benefits which were previously paid to the Employee must be reimbursed by defendant-appellee Second Injury Fund. (35a) The Fund appeared and asked that the Board dismiss the claim by the Employer for failing to give notice of the *likelihood that compensation may be payable beyond a period of 52 weeks after the date of injury* received by the Employee as required by a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101, et seq., MCL 418.925(1), second sentence. (35a)

The Board dismissed the claim by the Employer against the Fund with the determination that the Employer failed to give the Fund notice before the first anniversary

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[3] These are the same facts that were recited in the *Brief on Appeal - Amicus curiae Munson Hospital.*

[4] Later known as the Bureau of Workers' & Unemployment Compensation and now as the Workers' Compensation Agency.

of the injury that it was "likely" that compensation would continue after the first anniversary. *Bailey v Oakwood Hosp and Medical Center*, unpublished order and opinion of the Board of Magistrates, decided on October 4, 1999 (Docket no. 100499041). (1a, 5a)

The Workers' Compensation Appellate Commission reversed and remanded the case to the Board with the mandate that the Board join the Fund as a party defendant. *Bailey v Oakwood Hosp & Medical Center*, 2000 Mich ACO #292. (6a, 11a)

On remand, the Board conducted an evidentiary hearing and granted the claim by the Employee but denied the claim by the Employer by ordering the Employer to pay the Employee the continuing weekly compensation and the costs of all medical care. *Bailey v Oakwood Hosp & Medical Center*, unpublished order and opinion of the Board of Magistrates, decided on February 5, 2001 (Docket no. 020501007). (13a, 22a-23a)

The Commission modified the decree of the Board by ruling that the Employer was not responsible for any compensation after the first anniversary of the personal injury that the Employee received. The decree of the Board dismissing the Fund was affirmed. *Bailey v Oakwood Hosp & Medical Center*, 2002 Mich ACO #185. (25a, 32a)

The Court of Appeals granted leave to appeal and allowed the director of the Bureau to participate as an amicus curiae, *Bailey v Oakwood Hosp & Medical Center*, unpublished order of the Court of Appeals, decided on November 14, 2002 (Docket no. 243132) (33a) and reversed and remanded to the Commission for a determination of the question about the accuracy of the decision by the Board that the Employee was not avoiding work which had been mooted by the decision of the Commission. *Bailey v Oakwood Hosp and Medical Center*, 259 Mich App 298, 306-307; 674 NW2d 160 (2003). (38a)

The Court granted leave to appeal and invited Munson Hospital to file a brief amicus curiae on the question of,

> ". . . whether the Court of Appeals properly interpreted MCL 418.921 and MCL 418.925 in *Robinson v General Motors*

Corp, 242 Mich App 331 (2000), *Valencic v TPM, Inc*, 248 Mich App 601 (2001), and this case. In discussing this issue, the parties should consider the following: (1) whether the imposition of liability on the employer for paying benefits after 52 weeks of disability, in those situations where the Second Injury Fund does not receive statutory notice, is consistent with MCL 418.921's statement that the employer's liability 'shall be limited' to a 52-week period and that responsibility for all later benefits 'shall be the liability of the fund'; (2) whether MCL 418.925's placement of responsibility for providing notice to the Second Injury Fund on the carrier, not the employer, affects the analysis of this issue; and (3) whether the lack of a statutory remedy for a carrier's failure to provide timely notice to the Second Injury Fund affects the analysis of this issue." *Bailey v Oakwood Hosp and Medical Center*, 470 Mich - ; - NW2d - (2004). (44a)

ARGUMENT

I

ONLY SECTION 911, THIRD SENTENCE, LIMITS THE CIRCUMSTANCES FOR APPLYING SECTION 921, SECOND SENTENCE, OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969.

A. THE PRINCIPLE OF LAW EXPRESSED BY THE COURT TO DECIDE THE CASE OF *IN RE NOECKER*, 472 MICH 1; - NW2d - (2005) APPLIES TO THIS CASE.

In the case of *In re Noecker*, 472 Mich 1; - NW2d - (2005), the Court decided that the costs of a disciplinary proceeding by the Judicial Tenure Commission could not be assessed on a judge as there was no authorizing court rule or statute. An administrative file was opened to consider whether a court rule could be promulgated and, if so, what the terms of such a court rule might be. In particular, the Court said in the case of *In re Noecker*, *supra*, 14, 15-16, that,

> "[t]he Michigan Constitution created the Judicial Tenure Commission and outlines the power of the Michigan Supreme Court to discipline judges:
>
> > On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his

> duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. [Const 1963, art 6, § 30(2).]
>
> Pursuant to this constitutional provision, the Court has promulgated court rules governing judicial discipline proceedings. As the JTC noted, no specific court rule or statute provides for imposing costs in judicial disciplinary matters.
>
> * * *
>
> We leave for another time the determination whether the assessment of costs is consistent with the Michigan Constitution. In this case, respondent should not be required to pay the costs of his prosecution because he had no notice of the standards for imposing them.
>
> We have opened an administrative file to consider the constitutional issue and the standards to be applied in the event costs can be assessed in these matters. ADM 2004-60."

The principle of law underneath the decision by the Court is that there must be some text authorizing a sanction so that a person might have notice of the consequences from their conduct. *In re Noecker, supra*, 15. There, the Court said that,

> ". . . a respondent is entitled to notice of what conduct will subject the respondent to the assessment of costs. Past decisions of this Court have not provided notice because they were issued without explanation of the standards used in assessing costs.
>
> We agree with the JTC concurrence/dissent's observation:
>
> > Respondent Noecker cannot be said to have been given notice of the standards to be applied and the type of expenses that could be assessed in this case. . . . The imposition of actual costs has been extremely rare in the history of reported cases. The commission has not set standards for the imposition of costs until today. Therefore, imposition of costs in this case, if the Supreme Court believes they are authorized by law, would violate the spirit of *In re Brown*.
>
> Where a judge has been given no notice of the standards for imposing costs, the judge should not be made to pay them."

This principle that there must be some text in a provision of the constitution, court rule, or statute authorizing a sanction applies to this case.

In this case, the statute which applies is bereft of any text authorizing any sanction by stating, in full,

> "[w]hen a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability." MCL 418.925(1).

The proper protocol to create a sanction is for the legislature to amend section 925(1) because it was the legislature which established the rule just as the proper protocol to create a sanction in *In re Noecker, supra,* was for the Court to amend the court rules because it was the Court which was authorized by the constitution to implement the discipline of judges. The department of government responsible for the rule is the department of government which must establish the sanction. Another department cannot.

RELIEF

Wherefore, amicus curiae Munson Hospital prays that the Court reverse the opinion of the Court of Appeals in *Bailey v Oakwood Hosp and Medical Center*, 259 Mich App 298; 674 NW2d 160 (2003).

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